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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No.

RICHARD McDANIEL,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I N D E X

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IN THE
SUPREME COURT OF THE
UNITED STATES

_____ Term, 1972

RICHARD McDANIEL
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on May 11, 1972, which became final by the denial of a Petition For Rehearing and Petition For Rehearing En Banc on June 15, 1972.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is as yet not reported in a bound volume, but it is Opinion Number 71-2810 delivered May 11, 1972, and is appended hereto as Appendix "A". The opinion denying the Petition For Rehearing is appended hereto as Appendix "B".

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered

on May 11, 1972. A Petition For Rehearing and Petition For Rehearing En Banc was denied on June 15, 1972 and the Judgment became final on that date. The jurisdiction of this court is invoked under 28 U.S.C.A. ¶1254(1).

QUESTIONS PRESENTED FOR REVIEW

Question Number One: The search of this Petitioner's automobile, which revealed a quantity of marijuana in the trunk, conducted at a Border Patrol checkpoint on a highway connecting Laredo, Texas and San Antonio, Texas approximately 8 miles north of the International Border between the State of Texas and the country of Mexico, which search was conducted by officers of the Immigration and Naturalization Service, who are also authorized to act as customs officers, was illegal because the search was conducted without a warrant and without reason to believe that the automobile was either being used to transport illegal aliens or contained goods subject to duty.

Question Number Two: The District Court committed reversible error by admitting before the jury incriminating statements attributed to the Petitioner without requiring that the Government show a knowing and intelligent waiver by the Petitioner of specified Constitutional rights.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions, Statutes and Regulations Relevant To Question Number One:

UNITED STATES CONSTITUTION, FOURTH AMENDMENT:

"The right of the people to be secure

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

SEARCH OF VEHICLES AND PERSONS BY CUSTOMS OFFICERS:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle, beast or otherwise and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contary to law....."
19 U.S.C. ¶482.

POWERS OF INSPECTION BY IMMIGRATION OFFICERS:

(a) "The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States, shall be conducted by immigration officers...[who] are authorized and empowered to board and search any vessel, aircraft, railway

car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of this service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes ennumerated in §1182 of this title..."
8 U.S.C. ¶1225 (a).

<u>POWERS OF IMMIGRATION OFFICERS AND EMPLOYEES WITHOUT WARRANT:</u>

(a) "Any officer or employee of the service authorized under the regulations prescribed by the Attorney General shall have power without warrant ---

(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(3) Within a reasonable distance from any external boundary in the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of 25 miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patroling the border to prevent the illegal entry of aliens into United States.

(c) Any officer or employee of the service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for an exclusion from the United States under this chapter which would be disclosed by such search." 8 U.S.C. ¶1357.

DEFINITIONS OF TERMS USED:

(a) (1) External Boundary. "The term 'external boundary,' as used in §287 (a) (3) of the Act, means the land boundaries and the coast line of the United States, including the ports,

harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea." 8 C.F.R. 287.1.

(2) Reasonable Distance. "The term 'reasonable distance,' as used in §287 (a) (3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the District Director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to ¶ (b) of this section." 8 C.F.R. ¶287.1.

Constitutional Provisions, Statutes and Regulations Relevant To Question Number Two:

UNITED STATES CONSTITUTION, FIFTH AMENDMENT:

"No person...shall be compelled in any criminal case to be a witness against himself...."

UNITED STATES CONSTITUTION, SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right to... have the assistance of counsel for the defense."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

"[N]or shall any State deprive any person of life, liberty or property, without due process of law..."

STATEMENT OF THE CASE

The Petitioner and a Co-defendant, who was a passenger in the automobile, were arrested on January 27, 1971, at a border patrol checkpoint located approximately eight miles from the International Border and North of Laredo, Texas, on Texas Interstate Highway 35. At the behest of the immigration authorities, the Petitioner got out of the automobile and opened the trunk where the authorities discovered approximately 181 pounds of crude marijuana.

On April 20, 1971, this Petitioner and two Co-defendants were indicted in the United States District Court for the Southern District of Texas at Laredo, Texas, in a three-count indictment charging in Count One the illegal smuggling of marijuana into the United States; Count 2, transporting and concealing the marijuana after importation, both contrary to 21 U.S.C. 176 (a); Count 3, which was stricken by the Court at the trial on the merits, charging failure to pay the transfer tax on the marijuana, contrary to 26 U.S.C. 4744 (a) (2).

Thereafter, on June 11, 1971, a hearing was held in the Honorable Ben C. Connally's District Court in response to the Defendant's Motion to Suppress, which Motion was denied. On July 20, 1971, the case was tried to a jury which returned a verdict of guilty on Counts 1 and 2 of the Indictment. On August 26, 1971, the Petitioner was sentenced to five years confinement on each Count, concurrently, by the Honorable Ben C. Connally

Facts Relevant to Question Number One:

On Defendant's Motion to Suppress (Record p. 127) Gordon L. Aker, United States Border Patrol Agent, testified that on

January 27, 1971, he was working with his partner, Agent Cates, at a check-point on Texas Interstate Highway 35 approximately eight miles from the International Border at Laredo, Texas. The Petitioner McDaniel arrived at the checkpoint at approximately 12:30 A.M. where the automobile was referred to secondary inspection and, at the agent's request, the trunk was opened and a substance assumed to be marijuana by the border patrol agents was disclosed. (Record p.4-6) As stated by Agent Aker, the purpose of the checkpoint was "to check on any illegal aliens that might be leaving the area." (R. 6) On cross examination, Officer Aker testified that he and Agent Cates "had decided to open all trunks that night. We were opening every trunk that came up there." (R. 12) Because they had decided to search all automobile trunks that night, when this Petitioner arrived at the checkpoint, the decision to search had already been made. Mr. Aker inquired as to their citizenship and was satisfied that they were United States citizens; he described this Petitioner and the Co-defendant as blonde, fair complected, very personable looking young men and testified that they were not what he would call "hippie types." (R. 14) Mr. Aker further testified that at the time he asked this Petitioner to open his trunk, he was, "to a certain extent," suspicious; at least, to the extent that if the Petitioner had refused to open the trunk, he would not have let the Petitioner leave. (R. 14) However, the agent testified that he did not open the trunk because he was suspicious, but because "we were opening every trunk that night." (R. 15) The agent had no reason to believe that the car had been in Mexico, and he had received no advance call or notification from any source to watch for the automobile. (R. 16) The determination to search each automobile that night was made solely

by Agents Cates and Aker, with no consultation with higher authority. (R. 18) At the time of the search, Agent Aker was acting in his capacity as an immigration officer. (R. 20)

Facts Relevant to Question Number Two:

Throughout the course of the trial reference was made by Government witnesses to statements attributed to the Petitioner McDaniel while under arrest and in custody. Prior to trial, this Petitioner had filed a Motion in Limine (R. 140) requesting that the Government not mention, refer or allude to any statements attributed to this Petitioner in the presence of the jury until a hearing had been held outside the presence of the jury to determine the admissibility of the statement. This Motion was granted by the trial Court at the conclusion of the hearing on the Defendant's Motion to Suppress (R. 28) Thereafter, on July 20, 1971, prior to impaneling the jury, Petitioner's attorney requested a hearing to determine the admissibility of statements attributed to the Petitioner. (R. 30-32) The Court stated that the question would be ruled upon when it arose. It is to be noted that, on the hearing on Defendant's Motion to Suppress, Agent Aker testified that prior to opening the trunk of the automobile he was "suspicious," at least to the extent that if the driver had refused to open the trunk he would not have let them leave the scene. (R. 14-15) At this time, it would appear that because the Defendant's ability to leave the scene was terminated, he was then, for purposes of custodial interrogation, in custody and under arrest. See Miranda v. Arizona, 384 U.S. 436 at 444 (1966). Agent Aker testified that after he had had this Petitioner open the trunk and open the burlap bags therein; he then told the Petitioner

that he had a right to remain silent and "Agent Cates advised them of their rights." (R. 37) After objection by defense counsel, and at the Court's request, Mr. Aker testified that the following warnings were given to the Petitioner: they were informed of their right to remain silent, that anything they said could be used against them, their right to have a lawyer, and if they couldn't afford one "one could be procured for them;" and if they did decide to answer questions, they could stop at any time. (R. 37-38) Agent Aker also testified that the warnings were read from "the large form" and that, even though there was a waiver space on the form, this Petitioner declined to sign the waiver. (R. 39)

The Government's attorney then asked Mr. Aker if the Petitioner had any knowledge of the marijuana, at which point Petitioner's attorney objected on the basis that no knowing waiver had been shown. The objection was overruled. (R. 41) Agent Aker then testified that the Petitioner had stated that "the marijuana had been brought across up river. He did not know exactly where, but by another party." (R. 41) Defense counsel again objected on the same basis, but was again overruled. (R. 42)

Later in the course of the trial, at a hearing held outside the presence of the jury, Agent Reyher testified that he entered the case when this Petitioner was brought to Border Patrol headquarters in Laredo. At that time Mr. Reyher asked this Petitioner if he understood the form informing him of his Constitutional rights and that the Petitioner "asked if he had to sign the waiver part, and I said no, he did not." (R. 60) The Agent then discussed with the Petitioner the possibility of the Petitioner taking the contraband to its destination to assist the

Agents in making arrests of others. (R. 60)

After the jury was reseated in the Courtroom, the Court asked Agent Aker to tell what conversation took place between the agent and this Petitioner at the trunk of the automobile at the time of his arrest.

> THE COURT: What did you say to him and what did he say to you?
>
> THE WITNESS: I asked Mr. McDaniel to get out of the car and open the trunk, which he did. When we saw the bags, I asked him what was in them, and he said alfalfa for his horses. I said that is very unusual way to buy alfalfa and he said, "Well, the horses like it that way." At that point I asked him why the other bag was not filled, and he didn't know. I asked if they declared it at the Customs at the bridge and he said he had not declared it, it had been brought across by another party from Mexico. I asked him why the fourth bag was not filled and he said he didn't know. I asked him how much they had bought and he said he thought around a hundred and twenty pounds, he wasn't sure. At that point we went in the van and I told him that he didn't have to say anything further.
>
> THE COURT: That is when you warned him, when you went in the van?
>
> THE WITNESS: I told him at the car that he didn't have to say anything further, and then we went to the van and he was given his rights and we made a report. (R. 72-73)

The Government attorney then emphasized on redirect examination that it is improbable

a person would drive from Dallas to Laredo to buy alfalfa. (R. 74) The total effect on the jury of the admitted statements was that the Petitioner knew the contraband was in the automobile; that it had been illegally crossed "up river;" and that the Petitioner had refused to cooperate with the government agents.

Sheldon Reyher, the next Government witness, testified in the presence of the jury, as stated previously, that this Petitioner read the waiver form, asked if he had to sign the waiver portion, and was told he did not. (R. 80-81) Agent Reyher further told the jury that this Petitioner had declined to cooperate with the Government in delivering the marijuana to its ultimate destination; that the possibility of such a delivery had been discussed in two separate conversations. (R. 83)

In the Court's charge to the jury, the statements attributed to this Petitioner were re-emphasized by the Court:

> "I believe Mr. Aker told us that he asked Mr. McDaniel if the bags of material had been crossed at the bridge, if they had been declared, a Customs declaration had been made. And he said no, that it had been crossed up river somewhere by some third person whose name was not divulged, apparently. That he asked, that Aker then asked McDaniel how much they had bought and McDaniel said he thought it was about one hundred twenty pounds.
>
> Shortly thereafter the defendant was taken into the Border Patrol headquarters in town and the Customs agents were contacted, and Mr. Reyher, who appeared as a witness, told us of

> some further discussion that he had with the defendant. He told us, as I remember it, that he had one or possibly two conversations with him, that he stated that this was a large commercial quantity of marijuana and Customs was anxious to apprehend whoever was on the receiving end up in Dallas, I believe, or Central Texas, and suggested to this defendant that he go through with a scheme to carry it up there and make the delivery to permit Customs to arrest whoever was supposed to receive it. After some discussion and consideration, that plan was not pursued.
>
> The evidence further shows, I believe, that after some conversation with this defendant, and after checking to determine to whom the vehicle was registered, the agents went to the airport here in Laredo and arrested Limones, the third person who is named in the indictment, but whose guilt or innocence is not before you here today.: (R. 109-110)

While the Government evidence may show that the accused was informed of certain essential constitutional rights, nowhere does there appear evidence of a knowing and intelligent waiver of these rights, except for the fact that certain statements were elicited. "A valid waiver will not be presumed...simply from the fact that a confession was in fact eventually obtained." Miranda, Id. at 475.

REASONS FOR GRANTING THE WRIT

This application for a Writ of Certiorari presents to the Court two most important Constitutional questions not heretofore

upon by the Court; the first being the warrantless searches without "probable cause" and in the instant case, without even "reason to suspect," of automobile travelers upon our State and national highways within one hundred air miles of any external border. This action is authorized by several disparate Congressional enactments, but it is of questionable validity under the Fourth Amendment to the United States Constitution--especially where, as in the instant case, two immigration officers on their own initiative decide that "Tonight we will stop and search every automobile that comes along on this highway."

The second question of Constitutional dimension is a Miranda derivative involving the use of waiver forms by Government agencies. Here statements were admitted before the jury which were obtained after warning, but also after the accused had on at least two separate occasions refused to sign a form which was designed by the Government to signify a waiver by obtaining the signature of the accused. The inherent suggestion by the interrogating officers to the person in custody being that if you sign, you waive your rights; if you don't sign, you make no waiver.

The question being, specifically, where it is shown that warnings have been given, has the Government met its heavy burden of proof required in the second step of admissibility under Miranda, supra, of showing a knowing and intelligent waiver of these rights. Or was the person in custody misled into believing that by this refusal to make a written waiver when asked to do so, he could discuss his arrest without his statements being used against him in court.

It is further suggested to the Court

that this writ should be granted and that this case should be heard with Almeida-Sanchez v U.S.A., writ granted May 22, 1972, 11 Cr. L. 4058 (No. 71-6278), which case the Court has heretofore agreed to hear and which involves substantially the same question as question number one herein. The Court would be afforded an opportunity to more fully explore the questions by hearing both cases.

Respectfully submitted,

DONALD R. SCOGGINS
701 Elm Street, Suite 506
Dallas, Texas 75202

Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Donald R. Scoggins, attorney for Petitioner, certify that a copy of the foregoing Petition For Writ of Certiorari was served on James R. Gough, Assistant United States Attorney, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. James R. Gough, Assistant United States Attorney, 12000 Federal Building and U. S. Court House, 515 Rusk Avenue, Houston, Texas 77002, on this the 10th day of July, 1972.

DONALD R. SCOGGINS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2810

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD McDANIEL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(May 11, 1972)

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge: This is a case allegedly under the aegis of the "border search" doctrine, whose borders have never been geodetically defined and whose legal undulations are manifold. Transits and other paraphernalia, both legal and paralegal, lead to no certain perimeters. Given precedential latitude and constitutional longitude, we conclude that the search under the spotlight in this case came within the legal confines of a border search and within the constitutional confines of the Fourth Amendment.

APPENDIX "A"

Appellant, Richard L. McDaniel, and a companion were stopped by Border Patrol agents at 12:30 a. m. at a permanent immigration point some seven miles north of Laredo, Texas, and about eight miles from the Mexican border. The checkpoint was located along an interstate highway that leads from Laredo to San Antonio and points east. The agents had decided to stop every vehicle that night in search of aliens illegally entering. Having determined to his satisfaction that McDaniel and his companion were United States citizens, the agent requested that McDaniel open the trunk of his car. The agents testified that they were opening every trunk that night in search of aliens. The agent who talked with McDaniel also testified that the behavior of the car's occupants had aroused his suspicions; McDaniel was "nervous" and "a little bit too glib, too cooperative," while his rider was "almost frozen." When McDaniel opened the trunk the agent spotted four large burlap bags, partially covered with a Guadalajara newspaper. The contents were not discernible from the exterior of the bags. In response to the agent's question, McDaniel stated that the bags contained alfalfa. That response further aroused the agent's suspicions since, he testified, he had never seen alfalfa carried in that manner. In response to the agent's request, McDaniel opened the bags, and the agent felt and smelled what appeared to him to be marijuana. At that point the agents took McDaniel and his companion to the Border Patrol van and advised them of their *Miranda* rights. Although he stated that he understood each of his constitutional rights, McDaniel declined to sign the written waiver at the bottom of the *Miranda* form. Asked whether the substance in the trunk had been declared at the bridge, McDaniel

responded that it had not, that "the marijuana had been brought across up river ... by another party." At about 1:00 a.m. the agents took McDaniel to the Border Patrol headquarters in Laredo, where the suspected contraband in the trunk was removed. A different agent readvised McDaniel of his *Miranda* rights. McDaniel again stated that he understood those rights, but again he declined to sign the written waiver. The agent asked McDaniel if he would consider "cooperating and delivering this to the ultimate destination, wherever it was," apparently without expressly alluding to the substance as marijuana. McDaniel asked questions about how that would be accomplished, and the agents responded with a plan. McDaniel asked to discuss the proposition with his companion, and the agents left the two alone for a period of about one-half hour. McDaniel emerged and declined to continue his journey with the contents of the trunk.

McDaniel was indicted and convicted by a jury of violations of 21 U.S.C.A. § 176a, knowing introduction of marijuana into the United States, and 26 U.S.C.A. § 2744, failure to pay a transfer tax on marijuana. McDaniel brings this appeal by alleging that evidence was improperly and unconstitutionally admitted in two instances: (1) by an illegal search, and (2) by a failure to abide the constitutional guidelines of *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. We find both allegations without merit, and we affirm the verdict and judgment below.

The Fourth Amendment protects the American citizenry from "unreasonable searches and seizures," but, of course, reasonableness may vary with circum-

stance. *United States v. Rabinowitz*, 1950, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653. The border search at an international boundary is a familiar rite to many citizens. An immigration officer is authorized to search any vehicle within a "reasonable distance from any external boundary of the United States" if he has "reasonable cause to suspect" illegally-entered aliens. 8 U.S.C.A. §§ 1357, 1225; 8 C.F.R. § 287.1. A customs officer is empowered to search vehicles upon the same standard, "reasonable cause to suspect," although the customs statutes do not prescribe any distance limitations to the search. 19 U.S.C.A. §§ 482, 1581; 19 C.F.R. §§ 23.1(d), 23.11. The standards for what has been termed a "border search" have been judicially restated as "reasonable suspicion" of acts illegal under the customs or immigration statutes. *See United States v. Valdez*, 5 Cir. 1972, slip op. 71-1777 [March 13, 1972]; *United States v. Salinas*, 5 Cir. 1971, 439 F.2d 376; *United States v. Maggard*, 5 Cir. 1971, 451 F.2d 502; *see also United States v. Garcia*, 5 Cir. 1971, 452 F.2d 419.

In substance, the term "border search" is merely a short-hand method of stating that a search is, under the circumstances, a "reasonable" stretch of the usual Fourth Amendment standard of "probable cause" because of the proximity of an international frontier and other attendant factors. The fact that one is in the process of crossing an international boundary provides sufficient reason in itself to permit a search for aliens or contraband, without the presence of any other circumstance that would normally have to attend the requirements of the Fourth Amendment:

> "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."

Carroll v. United States, 1925, 267 U.S. 132, 154, 45 S.Ct. 280, ——, 69 L.Ed. 543, 551-552. It is settled law that the nation's perimeters are expandable for purposes of a border search, whether under the customs or the immigration authority. *See King v. United States*, 5 Cir. 1958, 258 F.2d 754, *cert. denied*, 359 U.S. 939, 79 S.Ct. 652, 3 L.Ed.2d 639; *Barrera v. United States*, 5 Cir. 1960, 276 F.2d 654; *Marsh v. United States*, 5 Cir. 1965, 344 F.2d 317; *Thomas v. United States*, 5 Cir. 1967, 372 F.2d 252; *United States v. Hill*, 5 Cir. 1970, 430 F.2d 129. It is simply unreasonable to presume that all illegally-entering aliens or contraband can be apprehended along the borders themselves, and the Fourth Amendment has made reasonable accommodation to the necessity for border searches that must take place somewhat within the nation's frontiers. The Government defines a "reasonable distance" from the frontiers in which an immigration search may be effected as any point within 100 air miles of the external boundary, 8 C.F.R. § 287.1. While the customs statutes and regulations prescribe no similar geographic limitation upon the power of customs agents to conduct a "border search," the search provisions of the customs laws are, of course, subject to the constitutional tests of reasonableness. *See* 19 U.S.C.A. § 482; *United States v. Hill, supra; Thomas v. United States, supra; Marsh v. United States, supra; United States v. Tsoi*

Kwan Sang, 5 Cir. 1969, 416 F.2d 306. However, proximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements. We would find it peculiar, for example, if massive searches were permissible in downtown Cleveland or Buffalo on the basis of a "border search" theory. Therefore, while "border search" is a convenient phrase to describe a reasonableness standard for searches pursuant to the customs and immigration laws, it is not sufficiently internally descriptive to justify automatically the reasonableness of all searches conducted for customs and immigration purposes within a certain proximity to national borders. Once the national frontier has been crossed, the search in question must be reasonable upon *all* of its facts, only one of which is the proximity of the search to an international border. *See United States v. Warner*, 5 Cir. 1971, 441 F.2d 821; *Marsh v. United States*, *supra*. The following factors lead us to conclude that the search of McDaniel's car was reasonable and constitutional.

First, the checkpoint in question is reasonably situated. It is a permanent point, made permanent because the road along which it is located closely parallels the meanderings of the Rio Grande River for some five miles immediately outside Laredo. The proximity of the road to the river, as the Government pointed out in oral argument, has made that stretch of road historically amenable to alien crossings or illegal importation of contraband. The dry and fordable condition of the river at the time of the search in January added to the Border Patrol's concern with this point

alongside the border. And the whole stretch of country between Laredo and San Antonio is generally desolate, spotted only by a few large towns. In order for a Border Patrol to be effective, it seems quite reasonable that some permanent points be established along isolated areas that might be or have been most easily employable for violations of the customs and immigration laws.

Second, the time of the day at which the checkpoint was operated adds an increment of reasonableness to the search in question. The agents went on duty at midnight and remained at the point until eight o'clock the next morning. While traveling in the early hours is clearly not "probable cause" for a search, it may, under certain conditions, properly arouse "reasonable suspicion." *Cf. Spinelli v. United States*, 1968, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637; *Thomas v. United States, supra; King v. United States*, 9 Cir. 1965, 348 F.2d 814, *cert. denied*, 1965, 382 U.S. 926, 86 S.Ct. 314, 15 L.Ed.2d 339. The nature of the stretch of road in question and the reasonable concerns of the agents regarding illegal border crossings at that point of the road would constitute sufficient attendant conditions to permit the unusual hour of travel to give rise to a reasonable suspicion. In addition, the unusual hour during which the search was operated caused a substantially lesser inconvenience and intrusion into the daily lives of innocent citizens who might simply be utilizing an interstate highway east from Laredo. *Cf. Fernandez v. United States*, 9 Cir. 1963, 321 F.2d 283.

Third, if the car can reasonably be stopped pursuant to an authorized border search, the agents are em-

powered to search the car, including its trunk, for aliens. *See Ramirez v. United States*, 5 Cir. 1959, 263 F.2d 385; *United States v. Miranda*, 9 Cir. 1970, 426 F.2d 283. But even beyond that, the objective behavior of the car's occupants, as described by the agent, would support the proposition that the agents had "reasonable suspicion" to search the trunk within the confines of the immigration statutes.

Fourth, while the Border Patrol agents did not have authority to search the contents of the bags under the immigration laws, *see Contreras v. United States*, 9 Cir. 1961, 291 F.2d 63; *Roa-Rodriguez v. United States*, 10 Cir. 1969, 410 F.2d 1206; *United States v. Hortze*, S.D. Cal. 1959, 179 F.Supp. 913, they were empowered under the circumstances to search the bags under the authority of the customs laws. It appears that Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer. The agents testified that they had planned to wear their immigration hats that night, but we find nothing in the statutes that would preclude them from later donning their customs hats during a proper border search. *See United States v. Bird*, 5 Cir. 1972, slip op. 71-2832 [February 29, 1972]; *United States v. Maggard*, *supra*. However, since they are operating on an "expanded border search" theory in this instance, the agents must have adequate grounds for a "reasonable suspicion" that the bags contained a substance being transported in violation of the customs laws, 19 U.S.C.A. § 482.[1] The

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1 "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or

Guadalajara newspaper was in open view inside the trunk, as were the four bags. *See Coolidge v. New Hampshire*, 1971, ___ U.S. ___, ___ S.Ct. ___, 29 L.Ed.2d 564; *Haerr v. United States*, 5 Cir. 1957, 240 F.2d 533. In addition, McDaniel's explanation that the bags contained alfalfa did not comport with the agent's own general knowledge concerning the methods of transporting that grain. Taken in conjunction with the previously discussed behavior of both occupants, these circumstances amount to a very reasonable suspicion that contraband was in the bags.

In sum, we conclude that, under all of the circumstances involved here, the search of the vehicle was reasonable under the customs and immigration statutes and within the otherwise stricter confines of the Fourth Amendment. Once the bags had been opened and the agent had seen, felt, and smelled the contents,

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they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

19 U.S.C.A. § 482.

he had "reasonable cause to believe" that the contents were subject to duty. 19 U.S.C.A. § 482, *supra* note 1.

Much of the *Miranda* case, like the "border search" doctrine, turns on the reasonableness of the circumstances. It is the purpose of *Miranda* to lend some assurance to the judiciary that each potential criminal defendant knows his constitutional rights. Without *Miranda* a court would have a very difficult task of ascertaining the constitutionality of statements rendered while in custody under a number of cases. *E.g., Escobedo v. Illinois*, 1964, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; *Malloy v. Hogan*, 1964, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; *Murphy v. Waterfront Commission*, 1964, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678; *Carnley v. Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70; *Gideon v. Wainwright*, 1963, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Douglas v. California*, 1963, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. Even with *Miranda's* prescribed warnings, the certainty with which a court might determine that statements were made with full knowledge of rights and privileges under the Fifth and Fourteenth Amendments is often unclear. In this case the *Miranda* warnings were twice properly given and at the proper times, once at the Border Patrol checkpoint and again at Border Patrol headquarters in Laredo. At both stations McDaniel was asked if he understood his rights, and he replied in the affirmative. However, at both stations McDaniel was also asked to sign a written waiver of the constitutional rights outlined in *Miranda;* McDaniel asked the questioning agent whether or not he was required to sign the waiver, and on both occasions was

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answered in the negative. Yet on both occasions conversation between the agents and McDaniel continued, with the result that incriminating testimony was admitted tending to show McDaniel's knowledge that the substance in his trunk was really marijuana and not alfalfa.

The first agent at the checkpoint, having read the *Miranda* warnings and ascertained that McDaniel understood then, asked whether the substance in the trunk had been declared at the bridge, although he did not specifically refer to the substance as marijuana. McDaniel responded that "he had not [declared it]," and then proceeded to volunteer that "the marijuana had been brought across up river. He did not know exactly where, but by another party." The agent at the Laredo headquarters, after the warnings were given and the waiver refused, asked McDaniel if he would consider "cooperating and delivering this to the ultimate destination, wherever it was," again apparently without alluding to the contents of the trunk as marijuana. McDaniel asked questions about the mechanics of that cooperation, and the agents proffered a plan. McDaniel asked to discuss the proposition alone with his rider, and the agents agreed. McDaniel emerged half an hour later and refused to continue his journey with the trunk's contents. These two actions by McDaniel were certainly probative of his knowledge that the substance in the trunk was really marijuana, a crucial element for conviction under the statute. There was other evidence in the record to support a jury finding that McDaniel knew the nature of his cargo, but these statements are so prejudicial that, if improperly elicited, they would require reversal.

We conclude, as did the district court, that McDaniel heard and understood his constitutional rights, and that the statements in question were voluntarily made. The *Miranda* warnings were read at two different times by two different agents. Each agent testified that McDaniel was asked specifically if he understood the rights and that McDaniel responded in the affirmative. McDaniel's incriminating statements were not made in response to any questions by the agents that solicited any information regarding the contents of the trunk. McDaniel is left with the proposition that his refusal to sign the waiver is, ipso facto, grounds for excluding any conversation subsequent to the proffer and refusal of the written waiver. That, however, is not the law of this court:

> "[T]he mere refusal to sign a waiver does not automatically render inadmissible all further statements of the defendant."

United States v. Phelps, 5 Cir. 1971, 443 F.2d 246, 248. *See also United States v. Hopkins*, 5 Cir. 1970, 433 F.2d 1041, *cert. denied*, 401 U.S. 1013, ____ S.Ct. ____, 28 L.Ed. 2d 550; *Hodge v. United States*, 5 Cir. 1968, 392 F.2d 552; *accord United States v. Thompson*, 4 Cir. 1969, 417 F.2d 196, *cert. denied*, 1970, 396 U.S. 1047, 90 S.Ct. 699, 24 L.Ed.2d 692. A refusal to sign a waiver may indicate nothing more than a reluctance to put pen to paper under the circumstance of custody. A detainee may still wish to discuss the matter with his detainers for any number of reasons, including a desire to exculpate or explain himself. Put another way, a detainee may make statements that are quite voluntary without signing a written waiver. A court must look to all

the circumstances of the detention to ascertain whether or not the refusal to sign a waiver was tantamount to a refusal to discuss. *See United States v. Johnson and Young*, 5 Cir. 1972, slip op. 71-2237 [February 3, 1972]; *see also United States v. Thompson, supra; United States v. Hayes*, 4 Cir. 1967, 385 F.2d 375, *cert. denied*, 1968, 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106. If the detainee affirmatively indicates a desire to end the conversation, then conversation must cease. *Miranda v. Arizona, supra.* But the detainee may also affirmatively indicate a willingness to maintain the conversation, and it appears to us that McDaniel so indicated. The first agent's only question to McDaniel after the initial stop and search at the checkpoint related simply to whether or not the substance in the trunk had been declared at the border. It was McDaniel, apparently in an effort to exculpate himself from suspicion of crossing the border, who volunteered that the substance was marijuana. Under the circumstances, that statement appears to us to have been entirely voluntary and to have been made with full knowledge of individual rights. The second agent's conversation with McDaniel in Laredo's Border Patrol headquarters related to the possibility that McDaniel might continue his journey with the contents of the trunk. It was McDaniel who requested more information regarding that proposition and more time to discuss it with his compatriot. Again, it was McDaniel who introduced the marijuana element into the conversation. And again, we must conclude that McDaniel voluntarily mulled over the proposition in an effort to assuage a difficult situation, and that his statements in conjunction with that mulling are likewise voluntary. *Compare United States v. Phelps, supra,* and

United States v. Ramos, 5 Cir. 1971, 448 F.2d 398, where officers persisted in their direct questioning of the detainees regarding the specific elements of the suspected crimes, despite the manifest reluctance of the detainees in those cases to maintain any conversation with the agents, which included the refusal to sign written waivers. McDaniel was read his *Miranda* warnings twice and stated both times that he understood them. Nevertheless, he volunteered unsolicited information that the contents of the trunk was marijuana, and he solicited and considered information regarding a cooperative scheme to deliver the trunk's contents. Under these circumstances, McDaniel's incriminating statements appear to be voluntary, and we cannot say that *Miranda* has been violated:

> "When all the circumstances indicate that the defendant knew of his right to remain silent and intelligently waived that right, the refusal to sign a written waiver does not render a confession inadmissible."

United States v. Johnson and Young, supra at 5.

Although McDaniel's conviction treads perilously close in some respects to the borders of both the Fourth Amendment and the Fifth Amendment-*cum-Miranda*, we conclude that the search and the statements in question here managed to remain inside that sometimes uncertain but always potent constitutional line which encircles the Government's relationships to its individual citizens. This balancing act is therefore AFFIRMED.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2810

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD McDANIEL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 11, 1972, 5 Cir., 1972, ____ F.2d ____).

(June 15, 1972)

Before WISDOM, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.